

A guide to non-charitable purpose trusts in the British Virgin Islands

Service area / [Trusts and Private Wealth](#)

Location / [British Virgin Islands](#)

Date / [March 2017](#)

Introduction

A trust is a legal arrangement which distinguishes between the legal and beneficial ownership of property. In order to create a trust a settlor will transfer legal title to property to a trustee or trustees who will administer the property for the benefit of beneficiaries, or for the furtherance or attainment of certain purposes. Accordingly, a trust is an arrangement intended for the safekeeping, management and eventual disposal of property.

Historically, subject to limited exceptions, only trusts which had identifiable beneficiaries were recognised as valid. The rationale for this approach was that identifiable beneficiaries were required to 'enforce' the trust against the trustees (ie to monitor the trustees to ensure they were administering the trust and discharging their duties to the relevant standard).

A customary exception to the requirement for identifiable beneficiaries arose through the development of trusts created for exclusively charitable purposes, or 'charitable purpose trusts'. In the context of British Virgin Islands ("BVI") charitable purpose trusts the trustees may hold and administer the trust property in furtherance of specific or general charitable purposes, rather than for the benefit of beneficiaries, and as there are usually no identifiable beneficiaries to monitor the trustees' actions the Attorney General of the BVI (the Attorney General) has power to enforce such trusts.

Based on similar principles most leading offshore jurisdictions, including the BVI, have enacted legislation enabling the creation of non-charitable purpose trusts, ie trusts which seek to achieve or further non-charitable purposes.

BVI non-charitable purpose trusts

Section 84 of the BVI Trustee Ordinance, which took effect on 1 November 1993, contains the BVI's original non-charitable purpose trust legislation and applies to BVI non-charitable purpose trusts (Purpose Trusts) created before 1 March 2004. Following a review of section 84, section 84A of the Trustee Ordinance (section 84A) was enacted. It took effect on 1 March 2004 and applies to Purpose Trusts created on or after that date.

The two sections, which were most recently updated by the BVI Trustee (Amendment) Act 2013, are broadly similar but section 84A contains a number of additional advantageous provisions which are absent from its predecessor. Unless otherwise stated, this guide relates to Purpose Trusts created under section 84A.

Creation

Any individual or corporate entity may create a Purpose Trust for any purpose or purposes providing the following conditions are met:

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- the purpose(s) are:
 - a. specific, reasonable and possible;
 - b. not immoral, contrary to public policy or unlawful;
 - c. not charitable.
- at all times at least one trustee is a 'designated person' (a Designated Person). The definition of Designated Person in section 84A includes: BVI trust companies licensed under the BVI Banks and Trust Companies Act, 1990; BVI private trust companies; and barristers, solicitors and certain accountants practising in the BVI;
- the trust instrument appoints an enforcer and provides for the appointment of another enforcer on any occasion in which there is no enforcer, or no enforcer able and willing to act; and
- the initial enforcer is party to the trust instrument or consents in writing to acting as enforcer by a written instrument addressed to the Designated Person trustee.

In addition to satisfying these conditions a Purpose Trust must fulfil the same legal certainties as are required for the valid creation of all BVI trusts, namely:

- there must be certainty that the settlor intended to establish the Purpose Trust;
- it must always be clear what assets are subject to the Purpose Trust (ie both at the time it is created and thereafter); and
- the objects for which the Purpose Trust is established (ie its purpose(s)) must be clear so that at any time it is possible to state with certainty whether a proposed use of the assets subject to the Purpose Trust is within the scope of the objects.

Duration

Purpose Trusts are exempt from the rule against perpetual trusts, meaning they may last indefinitely. However, the instrument which declares or evidences a Purpose Trust may specify a date or event on which the trust will cease to be a Purpose Trust (a terminating event) and set out how the trust assets will be distributed on the terminating event.

The trust instrument may also provide that until the terminating event the trustees will owe no duty (whether fiduciary or otherwise) to any person who will become entitled to the trust assets on the terminating event, or in respect of any purpose(s) for which the trust assets are to be applied on the terminating event.

The trustees

Like any other trust, a Purpose Trust must have a trustee or trustees and it is likely that the trust instrument will provide for the trustee(s) to be remunerated for their services and reimbursed for all expenses and liabilities properly incurred by them out of the trust property.

The trustees of a Purpose Trust will be required to administer the trust in accordance with the terms of the trust instrument, which will set out the purpose(s) the Purpose Trust has been established to achieve or further. Additionally, the trustees will be subject to the legal and fiduciary duties imposed on all trustees by BVI law, unless those duties have been validly diluted by the terms of the Purpose Trust or a specific statutory regime, such as VISTA.¹

There are two restrictions on who may act as trustee of a Purpose Trust. Firstly, a Purpose Trust's enforcer may not be or become a trustee, although there is nothing to prevent two different companies from the same group occupying the roles of trustee and enforcer providing they act independently of each other and discharge their respective duties to the relevant standard. Secondly, as mentioned above, at all times at least one trustee of a Purpose Trust must be a Designated Person.

The motivation for these restrictions is to promote the proper administration of Purpose Trusts, particularly by ensuring that the separation of powers between the enforcer and the trustees is observed so that enforcers are able to enforce the terms of their Purpose Trusts effectively.

In order to guarantee that a Designated Person will always act as the sole trustee or one of the trustees of a Purpose Trust section 84A requires the BVI court (the Court), on receipt of an application from a Purpose Trust's settlor (unless the trust instrument provides otherwise), trustee or enforcer, or the Attorney General, to appoint a Designated Person as trustee if the Purpose Trust has no Designated Person trustee.

Indeed, the enforcer and any non-Designated Person trustees are required to make such an application if they have "reason to believe" that a Purpose Trust does not have a Designated Person trustee "or that no designated person is likely in the immediate future to be appointed as a trustee pursuant to the terms of the trust instrument" and "all reasonable endeavours" on their part "to secure the appointment of a designated person as a trustee" have proved unsuccessful.

¹ "VISTA" is an acronym for the Virgin Islands Special Trusts Act, 2003 (as amended). Broadly speaking, VISTA is capable of applying to trusts governed by BVI law which hold shares in BVI companies. At least one of the trustees of a VISTA trust must hold a licence under the Banks and Trust Companies Act, 1990 or be a BVI private trust company and the trustee(s) may not also be director(s) of the company/companies held by the trust. Please see our separate client guide on VISTA trusts for more information.

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Section 84A imposes a duty on the Designated Person trustee to keep a 'documentary record' of the following in the BVI:

- the terms of the Purpose Trust;
- the identity of any other trustees and the enforcer;
- all settlements of property upon the Purpose Trust and the identity of the settlors;
- the accounts of the Purpose Trust; and
- all distributions and applications of property held by the Purpose Trust.

Role and rights of the enforcer

Under section 84A the enforcer of a Purpose Trust has "both the power and the duty of enforcing it". This means the enforcer must monitor the activities of the trustees to ensure they are utilising the assets subject to the Purpose Trust in such a way that achieves or furthers its purpose(s) and that they are otherwise administering the Purpose Trust properly.

If the enforcer is concerned about the actions of the trustees then he must take steps to bring them to account, the ultimate step being an application to the Court for it to intervene in the administration of the Purpose Trust. The Court may make such orders as it considers just in relation to the payment of any costs incurred by an enforcer in connection with enforcing a Purpose Trust (including ordering that those costs should be paid out of the assets subject to the Purpose Trust).

The enforcer will require certain information to enable it to enforce the Purpose Trust and to this end section 84A imposes a duty on every trustee of a Purpose Trust to provide the enforcer with copies of:

- the accounts of the Purpose Trust;
- the trust instrument and any deeds and other written instruments executed pursuant to the trust instrument;
- legal and other professional advice received by the trustees; and
- any other documents and information the trust instrument requires the trustees to provide.

Any additional powers and duties to be vested in the enforcer or others (such as the settlor), for example the power to appoint and remove trustees, can be detailed in the trust instrument of the Purpose Trust. The trust instrument is also likely to contain provisions which permit a professional enforcer to recover its fees and expenses out of the trust property.

Aside from the trustees, any legal person anywhere in the world may act as the enforcer of a Purpose Trust. Given that the role of enforcer is vital to the proper administration of a Purpose Trust and to avoid any suggestion that a Purpose Trust without an enforcer will fail (because in those circumstances there would be nobody to enforce the terms of the trust

against the trustees), the provisions of section 84A are designed to ensure that every Purpose Trust will have an enforcer at all times.

This is achieved by imposing a duty on the Designated Person trustee to notify the Attorney General in writing, as soon as practicable, if it has reason to believe that the Purpose Trust of which it is trustee has no enforcer, or no enforcer able and willing to act, and that no enforcer is likely to be appointed in the immediate future. On receipt of such a notice the Attorney General must, within 90 days, apply to the Court for an enforcer to be appointed. Section 84A confers a power on the Court to appoint an enforcer of a Purpose Trust, either to fill vacancy or in substitution for an existing enforcer, whenever it is expedient to do so but inexpedient to do so without the Court's assistance.

The purposes

The original BVI Purpose Trust legislation in section 84 of the Trustee Ordinance provided that trusts "for the benefit of particular persons whether or not immediately ascertainable" and trusts "for the benefit of some aggregate of persons ascertained by reference to some personal relationship" could not be Purpose Trusts. These restrictions do not appear in section 84A which instead provides that Purpose Trusts can be created "for any purpose or purposes" (assuming the conditions detailed in the 'Creation' section above are satisfied).

Consequently, the purposes of a Purpose Trust to which section 84A applies (ie one created on or after 1 March 2004) can include benefitting one or more identifiable beneficiaries such as individuals, corporate entities and foundations. Similarly, it is possible to establish a BVI trust which has both charitable and non-charitable purposes (the non-charitable purposes could be for the benefit of identifiable beneficiaries), providing that the element of the trust which is established for non-charitable purposes satisfies the requirements imposed by section 84A (among other things this will ensure that an enforcer is present to enforce the non-charitable purposes). In all cases, it is important that a Purpose Trust's purposes are clearly set out in the instrument which records the trust so that the scope of the trustees' and enforcer's duties is clear.

Subject to any variations to the purposes (as to which see below), when the purposes of a Purpose Trust have been fulfilled the trust will terminate. In these circumstances, unless the terms of the trust instrument provide otherwise, the trust fund will be held by the trustees on a resulting trust for the settlor or his estate (if he is deceased), which may give rise to significant and undesirable tax and/or other consequences. Accordingly it is vital that the settlor considers these factors before creating a Purpose Trust.

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Variation

On receipt of an application from the settlor (unless the trust instrument provides otherwise), a trustee or enforcer, or anyone else nominated by the trust instrument, the Court may vary any of the purposes of a Purpose Trust or enlarge or vary the trustees' powers or the other provisions of a Purpose Trust.

In exercising this power the Court may take into account the factors it considers material, such as any changes in circumstances since the Purpose Trust was created. Section 84A mentions that such changes in circumstances could include the fact that the execution of the Purpose Trust in accordance with its terms has become wholly or partially impossible or impracticable; unlawful or contrary to public policy; or obsolete because, due to the changed circumstances, the Purpose Trust fails to achieve the intention of the settlor and the spirit of his initial gift to the Purpose Trust.

Despite the Court's powers in the context of variations, section 84A does not prohibit the trust instrument of a Purpose Trust from including a power, which could be vested in the trustees or the enforcer, to alter the trust's purposes or other provisions without sanction from the Court. Equally there is nothing to prevent the trust instrument from stating that the trust's purposes or the other provisions of the trust instrument may only be changed by the Court.

Additional points to note

The following aspects of section 84A may be of interest to potential settlors, trustees and enforcers of Purpose Trusts:

- although it is not expressly stated, it is relatively clear that a Purpose Trust must be declared or evidenced by a written instrument;
- the provisions of section 84A will not invalidate any trust which would otherwise be valid;
- section 84A does not affect the law in relation to charitable purpose trusts or the Attorney General's power to enforce such trusts; and
- if the trustee or enforcer dishonestly appropriate any of the assets subject to a Purpose Trust or take any steps aimed at defeating the trust they will commit an offence under the BVI Criminal Code.

Uses of purpose trusts

Purpose Trusts are becoming increasingly popular as they can be used in a number of ways for commercial, succession or tax planning reasons, including:

- to hold the shares in special purpose vehicles used in connection with securitisations and off-balance sheet transactions, particularly where the parties to the transaction would like the relevant special purpose vehicle to be 'orphaned' (ie have no beneficial owner);
- to hold assets which need to be isolated from commercial transactions;
- to hold the shares of a private trust company which acts as trustee of, or otherwise provides trustee-related services to, a settlor's family trust(s). Such an arrangement can offer a number of benefits to potential settlors, particularly where the Purpose Trust in question qualifies to benefit from the provisions of the VISTA legislation (please see our separate client guides on BVI Private Trust Companies and VISTA for further information);
- to hold the shares in a family business to aid with succession planning, with the trustees of the Purpose Trust acting neutrally and independently of family dynamics;
- for investing in family companies where economic performance is likely to be poor or uncertain; and
- for social benefit or philanthropic projects (both public and private) which are not recognised as charitable, such as the building or maintenance of community facilities or areas, the preservation of monuments, and the furtherance of political purposes.

Conclusion

Since their introduction Purpose Trusts have become an integral part of the BVI trust industry's offering, primarily because (as detailed above) they can provide solutions to some of the most common issues encountered by settlors who wish to create an offshore structure. This is particularly the case now that the BVI has modern and flexible legislation governing Purpose Trusts in the form of section 84A. The appeal of Purpose Trusts is further enhanced by the fact that, like all other charitable and non-charitable BVI trusts, they are capable of enjoying the benefits offered by the VISTA legislation. Consequently, it is anticipated that Purpose Trusts will continue to play a prominent role in offshore transactions and arrangements in both commercial and private contexts.

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FIND US

Carey Olsen (BVI) L.P.
Rodus Building
PO Box 3093
Road Town
Tortola VG1110
British Virgin Islands

T +1 284 394 4030
E bvi@careyolsen.com



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Visit our trusts and private wealth team at careyolsen.com



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